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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 85

UNITED STATES OF AMERICA,

Appellant,

—v.—

CHARLES JACKSON, *et al.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE APPELLEE, CHARLES JACKSON

Opinion Below

The opinion and order of the district court (R. 15-19) are reported at 262 F. Supp. 716.

Jurisdiction

The order of the district court dismissing count one of the indictment on the ground of the unconstitutionality of the statute upon which the indictment was founded was entered on January 9, 1967 (R. 18-19). Notice of appeal

to this Court was filed by the Government on February 6, 1967, and probable jurisdiction was noted on May 29, 1967 (387 U.S. 929; R. 25). The Government invokes jurisdiction of this Court under 18 U.S.C. §3731.

Statute Involved

18 U.S.C. 1201(a) provides:

> Whoever knowingly transports in interstate or foreign commerce, any person who has been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away and held for ransom or reward or otherwise, except, in the case of a minor, by a parent thereof, *shall be punished* (1) *by death if the kidnaped person has not been liberated unharmed,* and *if the verdict of the jury shall so recommend, or* (2) *by imprisonment for any term of years or for life,* if the death penalty is not imposed. (Emphasis supplied)

Question Presented

Whether the Federal Kidnaping Act, 18 U.S.C. §1201(a), violates the Fifth and Sixth Amendments because it provides for the death penalty (where the victim has been harmed) "if the verdict of the jury shall so recommend," but imposes no death penalty otherwise.

Statement

Appellees were indicted in two counts on October 10, 1966. Count one charged that they had transported in interstate commerce from Milford, Connecticut, to Alpine, New Jer-

sey, in violation of 18 U.S.C. §1201(a), one John Joseph Grant III, an individual whom they had kidnaped to help them escape arrest, and that the victim was harmed when liberated (R. 1). By bills of particulars, the government specified that the victim had suffered lacerations of the wrist, hands and arms while being tied and while freeing himself (R. 3; R. 14). (Count two charged the transportation in interstate commerce of a stolen motor vehicle, in violation of 18 U.S.C. 2312. It is still outstanding.)

Appellee Jackson moved to dismiss the indictment on the grounds that §1201 puts the defendant to an unconstitutional choice in that it immunizes those who plead guilty against a death penalty but requires defendants who demand trial by jury to risk their lives. Jackson argued in the alternative that the statute was void for vagueness and also that in authorizing the death penalty for relatively trivial crimes it ran afoul of the Eighth Amendment's prohibition of cruel and unusual punishment (R. 7-13). The district court (Judge Timbers, Connecticut District) did not reach the latter two contentions, for it ordered count one of the indictment dismissed on the ground that the statute, in permitting the death penalty only upon recommendation of the jury and making such a recommendation mandatory, tended to deprive defendants of their "fundamental Sixth Amendment right to trial by jury" (R. 17), and was therefore invalid. The court reasoned that if defendants claim trial by jury "they must risk their lives," whereas if they waive a jury or plead guilty, that "risk is at least substantially reduced" because the judge in the latter case has discretion not to convene a jury and thus to eliminate the risk of a death penalty. Even if a court after accepting a guilty plea has authority to con-

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BRIEF FOR THE APPELLEE, CHARLES JACKSON

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vene a jury to determine punishment,[1] the court held, "that power is discretionary, its exercise uncertain" (R. 18). Consequently, one who waives a jury or pleads guilty substantially reduces, if he does not avoid entirely, the risk of a death sentence. The court concluded that exercise of one's Sixth Amendment rights were made "no less costly" by §1201 than assertion of one's Fifth Amendment right not to testify was made costly by comment in *Griffin* v. *California*, 380 U.S. 609, 614. It thus held that §1201(a) is invalid "to the extent that it impairs defendants' free exercise of their right to trial by jury" (R. 18).[2]

Summary of Argument[3]

The Fifth Amendment guarantees a defendant in a criminal case "Due Process of Law" and immunizes him against compelled self-incrimination. The Sixth Amendment vests in him a right to trial by jury. All of these fundamental constitutional rights are infringed by a statute which conditions his freedom to exercise them upon his risking the death sentence. This Court held that comment upon the defendant's failure to take the stand imposed an impermissible price upon the exercise of Fifth Amendment rights in

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[1] The court found it unnecessary to decide whether a judge who accepts a guilty plea has any authority to convene a jury to impose the death sentence, an issue upon which, the court noted, the Circuits are divided.

[2] Count one was dismissed not only as to the defendant Jackson but also as to his codefendants and co-appellees, Walsh and De LaMotte.

[3] We wish to acknowledge the heavy debt owed in the preparation of the argument to Cornelius J. Moynihan, Jr., of the Boston Bar, court appointed counsel for the defendant in *United States* v. *Holden*, No. 6809, District of New Hampshire, and, for uncompensated research, to William Hamilton, Douglas Nohlgren, and Paul Strasburg, students of the Yale Law School.

Griffin v. *California, supra,* even though it could not be proved that in a particular case the comment was prejudicial. The price imposed upon equally basic rights by §1201 is plainly a higher price and a heavier burden upon the exercise of the right to trial than was the penalty in *Griffin.* In holding §1201 invalid, therefore, there was no new or novel principle espoused or applied below.

The Government contends that the penalty provision of §1201 was designed to and has the effect of "mitigating the severity of criminal punishment" and, apparently, that the defendant should have nothing to complain about. Yet the original Kidnapping Act did not permit the death penalty. It is difficult to see, therefore, how the later amendment authorizing the death penalty can be regarded as a mitigation of punishment. In any event, the search for Congressional motives is irrelevant. If a statute materially burdens the exercise of constitutional rights it is invalid, especially where, as here, the burden includes an enhanced risk of death and there are no significant countervailing policies behind the provision.

Section 1201 properly and fairly construed does not permit the execution of one who pleads guilty. That penalty is reserved for those brazen enough to demand a trial. However, even if a judge after accepting a guilty plea has authority to convene a sentencing jury, the exercise of that authority is discretionary, whereas the judge has no authority in a case in which guilt is contested to prevent the jury from imposing the death penalty (provided there is evidence of harm). Thus, the defendant who pleads guilty is at least insulated from a jury's sentence of death by judicial discretion; the defendant who goes to trial has no such protection.

The Government attempts to equate the two procedures by arguing that the Court may construe the statute to require the judge to concur with the jury's decision before the death penalty can be imposed. Yet the language of the statute, its legislative history, and virtually all judicial authority precludes such a construction. Moreover, even if the Court were to rewrite the statute and give the judge discretion to treat the jury's role in sentencing as advisory only, the procedures for defendants who plead guilty and for those who do not are still very disparate, to the disadvantage of the latter. Thus, whatever construction is put on the statute, it imposes an unconstitutional penalty upon defendants who exercise their Fifth and Sixth Amendment rights.

The lower court was correct in holding the entire statute invalid. To excise the death penalty provisions only would have undesirable consequences and would partake of legislation in view of the fact that Congress, by amending the Act two years after its passage, clearly evidenced dissatisfaction with the statute in its original form, to which it would be returned by invalidating merely the death penalty provision. Even if the substantive provisions can legitimately be upheld, moreover, the entire penalty provision must fall. The offending provision is not merely that segment of the statute which authorizes the death penalty, but the entire penalty provision. The portion which provides a term of imprisonment where there is no jury recommendation is an essential ingredient of the inducement to a defendant to forego his constitutional rights. Were there no term of imprisonment authorized, if death was the only permissible penalty, the statute would not contain the defect it now carries, the defect lies in the disparate penalties,

neither of which, in or by itself, is constitutionally infirm. Therefore, if the offending provision is to be severed, it is the entire penalty provision rather than merely a piece.

ARGUMENT

I. A Statute Which Substantially Increases the Hazard of the Death Penalty for a Defendant Who Exercises His Fifth and Sixth Amendment Rights Is Invalid as Violative of the Fifth and Sixth Amendments.

The Government reads the lower court's opinion as holding that "any procedure for mitigating the severity of criminal punishment is invalid if, to invoke the procedure, the defendant might be induced to forego a constitutional right" (Brief, p. 6). Such a principle is said to have ominous implications, including what the Government regards as the *reductio ad absurdum*—outlawing guilty pleas to reduced charges. Yet nothing in the opinion of the district court announces such a broad principle; neither does the decision of the court need to rest upon it. In the first place, the death penalty provision of §1201 is not a "procedure for mitigating the severity of criminal punishment" as the Government labels it. Furthermore, a statutory scheme which significantly increases the probability of a death sentence for one who refuses to waive his Fifth and Sixth Amendment rights differs both in degree and kind from a judge's decision to accept a plea to a lesser offense than that originally charged.

There are doubtless procedural doctrines which test the outer limits of the principle applied in *Griffin* v. *California*,

380 U.S. 609, and other decisions of this Court,[4] that prices cannot be put on constitutional rights, but the procedures at issue here—the penalties imposed by §1201—are not in this penumbra where the penalty is insubstantial and equally basic rights conflict. The court below correctly considered §1201's invalidity to flow *a fortiori* from *Griffin*. When a defendant is compelled to risk his life as a condition to exercising his constitutional rights, there is no room for *de minimis;* nothing paltry about the price. For the validity of such a penalty even to be arguable, the countervailing policies served by the penalizing provision should be powerful and themselves anchored upon and in aid of other fundamental rights.[5] The provision invalidated below serves no such aim. We thus agree with the Government that in this case it is not "necessary to adopt an absolute prohibition of all procedures that may contain

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[4] *E.g., Miranda* v. *Arizona,* 384 U.S. 436, 468 (n. 37); *Spevack* v. *Klein,* 385 U.S. 511; *Garrity* v. *New Jersey,* 385 U.S. 493; *Sherbert* v. *Verner,* 374 U.S. 398, 403-406; *Green* v. *United States,* 355 U.S. 184, 193-194.

[5] The conflict between the right to a speedy trial and the right to a jury unbiased by press coverage, alluded to by the Government (Brief, p. 10, n. 6), is an example of procedural doctrines which unavoidably penalize constitutional rights yet are arguably valid. Federal Rule of Criminal Procedure 16(c), permitting the court to condition pre-trial discovery upon the defendant's own disclosure, is possibly another. But see statement of Mr. Justice Douglas, dissenting in part to adoption of amendments to Rules, 383 U.S. 1089.

On the other hand, it is well-settled that if it can be established that a judge sentenced a defendant more heavily merely because he elected to stand trial, the sentence is invalid. *United States* v. *Wiley,* 278 F.2d 500 (7th Cir. 1960); *Thomas* v. *United States,* 368 F.2d 941 (5th Cir. 1966). Likewise, if the prosecutor or the court threatens to impose a heavier sentence upon a defendant for failing to plead guilty, a guilty plea so induced is not a valid plea. *Machibroda* v. *United States,* 368 U.S. 487, 493; *United States* v. *LaVallee,* 319 F.2d 308 (2d Cir. 1963).

some potential of inducement to forgo a constitutional right" (Brief, p. 9). Our agreement is founded, however, on the firm belief that the decision of the court below needs no such absolute principle to sustain it.

The penalty provision of §1201 can easily be distinguished from a prosecutor's decision to reduce a charge prior to the entry of a guilty plea. The occasions when a charge will be reduced and a guilty plea entered fall generally into two categories: (1) the defendant is innocent of the more serious original charge and the prosecutor amends the charge to conform to the crime actually committed; (2) the defendant is guilty of the higher offense but the charge is lowered to induce a guilty plea. A court has no feasible way to determine which of these two circumstances, or what mixture of each, actuated a particular reduction. Yet it is only the latter situation which provides a substantial inducement to a guilty plea and permits the prosecutor to pressure the accused into foregoing his right to trial. A defendant initially charged with an offense of which he is clearly innocent (the first situation) will hardly consider the prosecutor's willingness to amend the charge as a material factor in deciding whether or not to plead guilty. If there is a plea, the reduction of the charge and the guilty plea may be causally independent decisions—the prosecutor will often reduce the charge in such a case even if the defendant persists in his not guilty plea. Thus, it is only a fraction of "overcharges" which constitute threats or inchoate penalties for going to trial. Reduction of the charge and entry of a guilty plea are no evidence that the case is one type rather than the other. Moreover, there is no known empirical evidence which suggests what proportion of plea reductions are in each category. Even if there were,

the proportions would differ from one prosecutor to another, and even from one offense category to another. To suppose that most of such occurrences are of the latter type—inducements to plead guilty—would be to indulge in speculation.[6] With §1201, on the other hand, the price tag on Fifth and Sixth Amendment rights is in the statute itself, applicable in every kidnapping case.[7] It cannot, therefore, be equated with charge reductions.

There is a second flaw in the Government's analogy. The penalty imposed by §1201 is eliminable simply by invalidating the statute. This would not "rob the criminal process of much of its flexibility" nor "lead generally to heavier penalties" (Brief, pp. 6, 7), as the Government claims would be the case if a judge could not accept a guilty plea to a reduced charge. Whether the charge reduction process is even amenable to effective judicial scrutiny is problematical. If the Court were to undertake to eliminate the possibility that an overcharge might induce a defendant to plead guilty, it would have to hold not only that a guilty plea to a reduced charge is invalid, but that the prosecutor has no power to amend charges in an indictment nor to reindict after voluntary dismissal. A prosecutor could often avoid even this constellation of restrictions by negotiating with the defendant before the initial charge is framed. The charging process, therefore, may be largely beyond the reach of courts.

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[6] *Cf.* Rubin, Criminal Justice in a Metropolitan Court 47-48. (Office of Criminal Justice, U.S. Dept. of Justice, 1966.)

[7] Even, it should be noted, when the indictment does not allege that the victim was harmed, for this Court held that kidnapping may be punished by death if the proof shows harm even though harm was not alleged. *Smith* v. *United States,* 360 U.S. 1.

If there is no feasible way for this Court to effectively outlaw pleas to reduced charges, the evils envisaged by the Government in judicial attempts to do so are plainly exaggerated if not imaginary. Even if such pleas could be effectively outlawed, moreover, there is no reason to believe that this would "almost certainly lead to generally heavier penalties" (Brief, p. 7), or that it would "most often work to the harm of the accused" (Brief, p. 9).

In many federal districts, charge reductions are relatively rare, yet we doubt that there is a discernible disparity in the ratio of guilty to not guilty pleas in such districts and in districts where charge reductions are common. Neither, we believe, is there a significant difference in the average sentences in districts where plea reduction is common and where it is not. There is neither evidence nor logic behind the Government's assumptions.

The only instance in which eliminating pleas to reduced charges might seem to "work to the harm of the accused" would be where a prosecutor is inclined to charge the defendant initially with the crime which he clearly committed, then later reduce to a lesser offense as part of a plea bargain. As noted above, the number of occasions in which this actually occurs is unknown. In some federal districts, *e.g.*, Connecticut, such a practice is infrequent. Even where this is the case, however, it is difficult to see what legitimacy can be claimed for procedures which permit one who is guilty of armed robbery to plead guilty to petty theft. A prosecutorial decision to reduce the charge in such a case and the plea of the defendant are both in clear contravention of the legislative will expressed in the definition of crimes. If it is thought undesirable for an accused to be convicted of the crime of which he is actually guilty, this

is an issue best addressed to the body which defines offenses. Moreover, even if charge reductions were eliminated, the prosecutor could avoid much of the "harm" to the accused by initially charging only a lesser included offense which the defendant committed. About all that would be confined by outlawing charge reductions, therefore, would be the freedom of the prosecutor to induce the defendant to plead guilty to a crime which he did not commit. Such discretion hardly lies at the base of our institutions.

Eliminating charge reductions would, as the Government suggests, deprive "the criminal process [*i.e.* the prosecutor] of much of its [*i.e.* his] flexibility" (Brief, p. 6), in that mistakes in overcharging an accused could cost the prosecutor a conviction because he would be unable to prove his case. Yet surely the inducement that such a risk would provide a prosecutor for investigating the case before framing the charge is not easily perceived as a blow to liberty nor as a backward step in this Court's efforts to civilize and legalize the criminal process.

In sum, there is nothing in the case before this Court which calls into question the validity of a guilty plea to a reduced charge, and the Court ought not to decide that question before it arises by accepting the Government's unsupported and unwarranted assertions that elimination of charge reductions would produce "harm" to the accused, more severe penalties, or other undesirable consequences.

Although the district court concluded that §1201 infringes the defendant's "fundamental Sixth Amendment right to trial by jury", it is manifest that since the statute has a substantial tendency to induce a defendant to plead guilty rather than demand a trial, it infringes his Fifth Amendment right to Due Process because it coerces a guilty plea

and tends to deny him the right to a trial guaranteed by the Due Process Clause; it is also, like the comment invalidated in *Griffin*, an infringement of the Fifth Amendment right against self-incrimination, for a guilty plea which is not voluntary is coerced self-incrimination of the first magnitude. It is thus too narrow a view of the matter to focus upon the effect which §1201 has upon the defendant's exercise of the right to have his guilt decided by jury rather than by the court, and we do not understand this to have been the intent of the district judge. The judge was correct, therefore, in concluding that it was irrelevant that the Government might have some power to prevent the defendant from waiving his right to jury trial under *Singer* v. *United States*, 380 U.S. 24, 34-38.[8]

It is also beside the point that the defendant has no absolute right to plead guilty. The plain fact is that judges do accept guilty pleas, and so long as a defendant is in a position to submit a guilty plea, he is strongly encouraged by §1201 to do so. Nor would the problem be avoided, as attempted by the District of Columbia Circuit Court in 1913, by holding that no guilty plea may lawfully be entered under a statute like §1201. *Green* v. *United States*, 40 App. D.C. 426 (1913). So long as judges remain *free in fact* to accept guilty pleas under the statute, the threat of §1201 remains.

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[8] The prosecutor's power to prevent the defendant from waiving a jury trial and thus possibly avoiding a death sentence, assuming *arguendo* that he has such power, effects only one way in which the defendant may seek to avoid a jury; it does not prevent the defendant from avoiding a jury by pleading guilty. Moreover, the defendant's hope that the prosecution will acquiesce in his efforts to avoid a jury and the death penalty will usually be fulfilled. The fact that the defendant has no absolute power to avoid the death penalty by pleading guilty or waiving a jury is therefore insignificant in assessing the real hazards he faces.

II. The Penalty Provision of the Kidnaping Act Exposes the Defendant Who Claims His Fifth and Sixth Amendment Rights to a Materially Greater Risk of the Death Sentence Than the Defendant Who Surrenders Those Rights, and Is Therefore Invalid.

The Government's main contention is that §1201 does not "constitute a significant burden upon assertion of the right to a jury trial" (Brief, p. 10). We turn, therefore, to that phase of Appellant's argument.

The Government seems to regard as relevant its view that the death penalty provision in §1201 is an "ameliorative measure", that it "reflects the movement . . . against the death sentence" (Brief, p. 7), and that, apparently because Congress failed to exert the last measure of its Draconian power, this provision is the product of humanitarian impulses and is a boon to the accused who faces prosecution under §1201. As the Government sees it, "the short of the matter is that the provision requiring the jury to authorize the death penalty is designed to minimize, not to increase, the occasions of its imposition" (Brief, p. 6). In view of the fact that the original Kidnapping Act did not permit the death penalty at all (47 Stat. 326) and that it was amended two years later to call for the death penalty whenever the victim "has not been liberated unharmed, and . . . the verdict of the jury shall so recommend" (48 Stat. 781), we find the Government's interpretation of Congressional motives difficult to comprehend. The real short of the matter, however, is that even if the motive of Congress in amending the Kidnaping Act to call for the death penalty could be distilled from the legislative history, which it cannot, whether that motive was pure and enlightened or perverse and retributive would be immaterial. If

the effect of the statute is to place a substantial burden upon the assertion of Fifth and Sixth Amendment rights, the statute is invalid.

The Government contends that a defendant charged with kidnaping does not significantly enhance the hazard that he will receive the death penalty by demanding a trial; that, conversely, he does not reduce that risk appreciably by pleading guilty or by waiving a jury. It reaches this conclusion only by tortuous reasoning and by disregarding authoritative interpretations of the statute and basic canons of construction.

It should be noted that the statistics cited by the Government tend to refute rather than to supports its claim. As reported in the Government's Brief (n. 9, p. 11), ten defendants have been sentenced to death under the Kidnaping and Bank Robbery Acts, 5 after pleading guilty, 5 after a trial. Yet since the ratio of guilty pleas to trials has been about 2 to 1 (389 plead guilty or no contest to kidnaping between 1951 and 1966, and only 174 plead not guilty),[9] it

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[9] A precise ratio cannot be ascertained from the figures provided in the Government's Brief, because no account is taken of those who were acquitted. This figure, however, is surely not substantial enough to alter the ratio significantly. The figures from which the 2 to 1 ratio were obtained, moreover, are those for the kidnaping offense only, whereas we are not told by the Government which of the ten sentenced to death under the Kidnaping and Bank Robbery Acts were in the former category. However, since 4 defendants have been sentenced to death under the Kidnaping Act since 1951, it seems likely that virtually all of the ten referred to were sentenced under §1201: And if we include in determining the ratio the pleas under the Bank Robbery Statute, the ratio becomes 4 to 1. (4079 defendants plead guilty or nolo to kidnaping or bank robbery, 966 went to trial. Yet half of those ordered executed were among the 966 who went to trial.) Although the ratio when so determined is more striking than that obtained by including only the kidnaping figures, it is probably less meaningful, since most bank robberies are non-capital offenses.

follows that defendants who plead not guilty received the death penalty twice as often as those who waived their rights to trial. If all the facts were known, the disparity would probably be even greater, for those defendants who inflicted grievous harm or death upon their victims probably tended to plead guilty—because the death penalty was more likely—than those whose offenses were less serious. Thus, although most of the factually serious offenses were probably dispose of by guilty pleas, the less serious by trials, defendants in the latter group still suffered the extreme penalty twice as often as those in the former.

The issue cannot be resolved by the statistics, however, but must be drawn from the statute. There, the magnitude of the risk to those who demand a trial is even clearer than is suggested by the statistics.

As the Ninth Circuit reads §1201, a defendant who pleads guilty runs no legal risk whatever of the death penalty, for there is no jury authorized to recommend the death penalty, *Waley* v. *United States*, 233 F.2d 804, 806 (9th Cir. 1956), *cert. den.* 352 U.S. 896 (1956) (*dictum*). This reading of the statute is correct. In specifying the death penalty "if the verdict of the jury shall so recommend", Congress clearly had in mind the twelve men who determined guilt or innocence. Indeed, one can comb the Code today for some provision authorizing or even referring to the empaneling of a jury solely to determine sentence, and he will find none. As the Government notes, the traditional practice in 1934, when the provision was enacted, was to leave sentencing to the court (Brief, n. 5, pp. 8-9). The legislative history of the provision contains no reference to sentencing by a jury other than contemporaneous with the determination of guilt in a trial. The Government has

cited, moveover, virtually no evidence that in 1934 or prior thereto, the practice of convening a special penalty jury existed or had been employed in the federal system or even in the States.[10] Federal Rules of Criminal Procedure 23 and 24 refer only to "trial jurors" and clearly contemplate by the term "jury" itself a body of men who decide disputed facts. It is submitted therefore, that the correct interpretation of §1201 is contrary to that espoused by the Government

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[10] The only pre-1934 decision cited by the Government (Brief, n. 8, p. 11) in support of the proposition that §1201 permits the judge, after a plea of guilty, to empanel a jury for sentencing, is *State* v. *Best*, 44 Wyo. 383, 12 P.2d 1110 (1932). In that case, however, the statute in question made the death penalty mandatory "unless the jury . . . qualify their verdict by adding thereto, 'without capital punishment.'" The defendant, after pleading not guilty and after the trial jury was empaneled, changed his plea to guilty and requested permission to offer evidence in mitigation of sentence. On appeal, he merely argued that a guilty plea should not have been permitted. Under the statute, it will be noted, the death penalty could be *averted* only if a jury was empaneled. Interestingly, the appellate court mentioned in passing that one could argue that no jury could be empaneled in a guilty plea case and that the death penalty would thus be mandatory. It preferred the more "liberal" view. The case is little support for the proposition advanced by the Government in this case.

The other State case relied upon by the Government, *State* v. *Belton*, 48 N.J. 432, 226 A.2d 425 (1967), is precisely contrary to the proposition for which it is cited. As that case reveals, in New Jersey a "guilty" plea is not acceptable in a first degree murder case and the penalty for first degree murder is death unless the jury recommends life imprisonment. However, the court may accept a plea of "non vult" or "nolo contendere" in its discretion, and when it does, no death penalty can be imposed. Thus, if the defendant enters and the court accepts what is tantamount to a guilty plea in New Jersey, no jury is empaneled for sentence determination and no death penalty can be imposed. *Id.* at 427. The law is likewise in New York. New York Penal Law §1045 (If defendant pleads guilty to first degree murder he cannot be given the death sentence; if he pleads not guilty he may, provided court and jury concur).

It is also of interest that in perhaps the only pre-1934 case presenting the issue now before the Court, the District of Columbia Court of Appeals assumed that, under a similar statute, if a defendant could plead guilty no death sentence could be imposed. *Green* v. *United States*, 40 App. D.C. 426, 427 (1913).

and accepted in *Seadlund* v. *United States*, 97 F.2d 742 (7th Cir. 1938). If a defendant pleads guilty, and the court accepts the plea, no sentencing jury may be convened and no death penalty imposed.

As the court below held, however, the above interpretation need not be accepted in order to find a substantial disparity in risk of death depending upon whether the defendant pleads guilty or demands a trial. As the Seventh Circuit said in *Seadlund, supra,* even if the court may convene a sentencing jury in a guilty plea case, it need not do so; the matter of convening a jury is entirely within the court's discretion. Of course, as *Seadlund* held and as the Government admits, if no jury is empaneled the judge cannot himself impose the death penalty. If anything is clear in the statute it is that the extreme penalty can be imposed only upon recommendation of a jury.[11]

Since it is within the discretion of the judge to empanel a jury to determine sentence in a guilty plea case, the court implied in *Seadlund* that it is also within the court's discretion to disregard a death recommendation when made by such a special jury. There are, therefore, two stages of absolute judicial discretion between the jury's recommendation of death and a sentence of death—that which exists before the jury is empaneled and that which survives even after the jury has made its recommendation.

The Government apparently accepts the interpretation of the statute immediately above (Brief, p. 13). It attempts to equate the risk of death assumed by the defendant who pleads not guilty, however, by urging that even where there is a trial, the judge is free not to submit the death penalty

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[11] Accord, *United States* v. *Dressler*, 112 F.2d 972, 980 (7th Cir. 1940).

issue to the jury, and equally free to disregard the jury's determination even though he decided in his discretion to submit the issue to the jury. In short, the role of the jury in the death sentence is advisory or precatory only. This reading of the statute is contrary to its language, its legislative history, and to virtually all judicial interpretations.

The statute says, in language as plain as language can be, that the defendant "shall be punished . . . . by death, . . . if the verdict of the jury shall so recommend." Congress could not have made its intent any clearer that the verdict of the jury is mandatory.

If the statutory language left any room for the interpretation urged by the Government, it would be removed by the legislative history. One reason asserted by the proponents of the provision was that it took the onus of inflicting death from the judge. 75 Cong. Rec. 13297. Yet the onus would remain with the judge if the sentencing power was really his and not the jury's. Moreover, in the House Report on this amendment to the act the provision was explained as having been added "to permit the jury to designate a death penalty for the kidnapper." H. Rep. No. 1457, 73d Cong., 2d Sess.

Construing a similar provision,[12] this Court said in *Winston* v. *United States,* 172 U.S. 303, 313 (1899), that

> "The act does not itself prescribe, nor authorize the court to prescribe, any rule defining or circumscribing exercise of this right; but commits the whole matter of

[12] The statute there in question provided that in all cases where the accused is found guilty of murder "the jury may qualify their verdict by adding thereto 'without capital punishment' " and whenever a verdict was so qualified the defendant "shall be sentenced to imprisonment at hard labor for life." 29 Stat. 487.

> its exercise to the judgment and the consciences of the jury. The authority of the jury to decide that the accused shall not be punished capitally is not limited to cases in which the court, or the jury, is of the opinion that there are palliating or mitigating circumstances. But it extends to every case in which . . . the jury is of opinion that it would not be just or wise to impose capital punishment. [The factors to be considered] in deciding the question whether the accused should or should not be capitally punished, is committed by the act of Congress to the sound discretion of the jury, and of the jury alone."

In holding that a jury given authority to sentence must be unanimous both on the matter of sentence and on the question of guilt, this Court in *Andres* v. *United States,* 330 U.S. 740 (1947), also precluded an interpretation which would make the jury's determination advisory only.

Not only is the jury's determination of sentence in capital cases mandatory in most federal statutes authorizing submission of the issue to the jury, it is also mandatory in the great majority of States having similar provisions.[13] It has even been held that

> "The statute[14] clearly leaves to the jury the discretion as to whether capital punishment should be imposed in the event of conviction, even when the government announces at the outset, as it did here, that it will not request the death penalty. The choice of the govern-

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[13] Knowlton, *Problems of Jury Discretion in Capital Cases,* 101 U. of Pa. L. Rev. 1099, 1102 (1953).

[14] 21 U.S.C. §176b, which provides that one who furnishes heroin to another under the age of eighteen "shall suffer death if the jury in its discretion shall so direct."

> ment not to urge capital punishment cannot and does not detract one iota from the jury's power to direct the death penalty." *United States* v. *Romero,* 249 F.2d 371, 374 (2d Cir. 1957).

The interpretation urged by the Government is in the teeth of the statutory language, contrary to its legislative history, and against the great weight of judicial authority.[15] There is simply no room for such a construction.

When the defendant pleads guilty, therefore, either there is no possibility of a death sentence (if our interpretation is correct) or there is a possibility which is heavily muted by two levels of judicial discretion—the first, whether the judge shall empanel a jury; the second, whether he shall accept the jury's recommendation. When the defendant demands a jury trial, however, the judge's role in the sentencing decision is virtually non-existent. He cannot refuse to submit the issue to the jury, nor can he ignore the jury's decision to impose the death penalty. Indeed, he is forbidden even to instruct the jury on the criteria which they should employ in deciding whether to impose the death sentence. *Winston* v. *United States, supra.* The defendant who demands a trial puts his life on the line much more clearly than if he were to plead guilty.

It cannot be assumed that the judge, when he has discretion regarding the death penalty, is never going to exercise it in favor of the accused in a case where the jury would impose death. Indeed, judicial discretion whether to submit the penalty issue to a jury (in the guilty plea case) is quite likely to save the life of a defendant who

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[15] See also, *Williams* v. *United States,* 131 F.2d 21, 22 (C.A.D.C. 1942); *United States* v. *Willis,* 75 F. Supp. 628, 629 (D.D.C. 1948).

would have been executed had the matter gone to the jury. As the Chicago Jury Studies show, judges differ substantially from juries on the cases in which they regard the death penalty as appropriate. In a study of 111 cases in which juries found defendants guilty of capital crimes, and the judge agreed on guilt, the Chicago study found that juries imposed the death penalty in 19 per cent of the cases, while the judge agreed with the jury's death decision in only 13 per cent. Kalven and Zeisel, The American Jury 436-437 (1966). In the cases studied, therefore, if the penalty had been imposed only with the concurrence of the judge, six per cent of the defendants' lives would have been spared. Looking at the matter another way, the chances of a defendant avoiding the death penalty if the judge had to concur with the jury would have been improved in the cases studied by about 32%.[16] This hardly seems insubstantial.

Although the argument is probably superfluous, we contend that even if the Court were to accept the Government's invitation to rewrite §1201 to confer upon the judge the unbridled authority to refuse to submit the penalty issue to the trial jury and to disregard the jury's verdict if the issue were submitted, the procedural disparities in guilty plea cases and in cases tried would still be too substantial to pass constitutional muster. In the guilty plea case, the decision whether or not to convene a jury would normally be made on a skimpy record. There would be no witnesses exhibiting their injuries and describing the atrocities allegedly committed by the defendant. Common sense compels the conclusion that a judge would be less likely on such

[16] The probability of a death sentence would have been reduced from 19% to 13%, a reduction of about 32%.

a record to feel that the death penalty was appropriate than after the facts were graphically presented in court. On the other hand, when there is a trial on the merits, the judge has little time for calm reflection. Being human, he cannot help but be affected by the emotional, vengeful aura emanating from the witnesses and the spectators in the courtroom. Neither can he fail to be affected by his perceptions of the jury's reactions to the courtroom aura and the graphic descriptions and exhibitions by the witnesses. It is not fanciful to suggest that a judge is far more likely to submit the penalty issue to a jury if called upon to do so at trial than if the issue arises upon a guilty plea.[17]

Once the jury is empaneled, there are still differences that work to the prejudice of the accused who demanded a trial. Since the jury in a guilty plea case is determining only the penalty, the defendant is entitled to introduce any evidence mitigating the offense, and any evidence of his character and background which suggests the inappropriateness of the death penalty. He is probably not entitled to offer the same evidence in a trial upon the merits.[18] Even if he were legally entitled to present such evidence, he would often be prevented as a practical matter from doing so because it would be tantamount to a confession of guilt. He cannot seriously deny that he committed the crime and at the same time offer testimony explaining why he did it. Thus, since the issues to be decided by the jury in a trial are different in part from those to be decided when the

[17] *Cf.*, Comment, 66 Yale L.J. 204, 218 (1956) (Judges queried regarding lighter sentences for defendants pleading guilty noted that the plea often minimizes revelations of brutal circumstances which, if graphically brought out at trial, would increase the sentence imposed by the court).

[18] Knowlton, *supra*, note 13, at 1108-1117.

jury is convened only to decide penalty, the evidence offered will be substantially different, usually to the prejudice of the accused who demanded that the Government prove his guilt.

The arguments made by defense counsel will likewise differ depending upon whether the jury is also deciding guilt. Counsel is deterred from arguing extensively against the death penalty if he also holds hope of getting an acquittal. Any trial lawyer knows that jurors are not receptive to inconsistent arguments, *viz.*, "My client didn't commit the crime, but if you find otherwise, please be merciful." [19]

The disparate procedural contexts in which the evidence is adduced and the arguments made will not only have their effect upon the jury's verdict, which verdict will itself influence the judge, they will directly affect the judge's own evaluation of the propriety of the death penalty.

Whether the Court accepts the interpretation of the statute made by the court below, that argued for by Appellee, or that urged by the Government, therefore, there is no conceivable construction which will equalize the procedures for determining the death penalty in guilty and not guilty plea cases. Whatever the interpretation, the defendant who elects to stand on his Fifth and Sixth Amendment rights places his life in considerably greater danger than the defendant who waives those rights. The statute is plainly invalid.

Affirmance of the decision below will be a great stride toward eliminating the death penalty from American law. As such, it will be one of the most significant, humane, and sensible decisions of the decade. The death penalty will be

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[19] *Id.* at 1118-1120.

nudged toward extinction because the Congress and State legislatures will be compelled to take a fresh look at statutory provisions like §1201 which impose the death penalty in an impermissible manner. Responsibility for the continuance of the death penalty can no longer be laid to previous legislatures nor to public inertia and disinterest. No longer can legislators postpone reconsideration of the question while allegedly more pressing matters like taxes, lotteries, and legislative ethics fill up their time. If executions are to continue for many state and federal offenses they will have to be affirmatively reenacted. We are confident that in most legislatures they will not be.[20]

Even if the death penalty were reenacted for provisions like §1201, the procedures for imposing the penalty could hardly help but be more enlightened than the method employed in §1201. Not only does the present procedure permit the penalty to be imposed without full presentation of relevant evidence (because the determination of guilt is contemporaneous with sentencing), it leaves the matter to the unguided, unlimited discretion of twelve laymen. Such laymen are uninformed about the defendant's mental make up, his background, and his potentialities for rehabilitation. To ask them under such circumstances to determine whether the defendant lives or dies is to compel them to rely upon the one quality they come to court with—their sense of retribution, and thus to repudiate every penological advance of the past century.[21]

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[20] Most recent polls show a majority of those polled favor abolition. And see Sellin, The Death Penalty (1959).

[21] The evil is magnified by jury exemptions of some of the most enlightened members of the community (See Knowlton, *supra*, note 13 at 1131), and by disqualification of all those who have scruples against executions. See *United States* v. *Puff*, 211 F.2d 171, 182-186 (2d Cir. 1954), *cert. den.* 374 U.S. 963; Oberer, *Does Qualifica-*

Jury sentencing is a means by which judges and legislatures shirk responsibility for the executions which they authorize. Their ability to hide behind juries accounts in part for the persistence of the penalty despite widespread public opposition to it.

Even though in our opinion, and that of most commentators,[22] jury sentencing is an anachronism which should be abolished, nothing in the decision below compels such a result. Juries could still share in the sentencing decision, consistent with the Constitution, in two-stage trials, if a *new* jury were convened to determine sentence after *all* convictions (whether by trial or guilty plea). If juries determined sentence in every case, uncontaminated by the trial of guilt, we see no clear constitutional infirmity in such a procedure.[23]

III. The Entire Statute Was Correctly Held Invalid. If Not, the Entire Penalty Provision, Including That Part Which Authorizes a Term of Years or a Life Sentence, Is Invalid.

Assuming *arguendo* the soundness of the Government's assumption that it might be appropriate to consider sever-

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tion of Jurors for Scruples Against Capital Punishment Constitute Denial of Fair Trial on Issue of Guilt?, 39 Texas L. Rev. 545 (1961).

[22] Knowlton, *supra*, note 13, at 1130; LaFont, *Assessment of Punishment—A Judge or Jury Function?* 38 Texas L. Rev. 835 (1960); Webster, *Jury Sentencing—Grab-bag Justice*, 14 Sw. L.J. 221 (1960); Comment, *Jury Sentencing in Virginia*, 53 Va. L. Rev. 968 (1967).

[23] Provided the jury is not given *carte blanche* to impose death. If no guidance or standards are given the jury, the procedure would be subject to attack for vagueness and as cruel and unusual punishment. See Defendant Jackson's Memorandum in Support of Motion to Dismiss. (R. 8-13.)

ing the death penalty provision of the statute and leaving the remainder intact (Brief, p. 13), it by no means follows that such a decision in this case would be good law or sound policy. Nor does the undeniable fact that "Congress resolutely intended to make interstate transportation of kidnaped persons a federal crime" (Brief, p. 14) provide a touchstone for decision. Even if the appropriate test for severability is whether Congress would have enacted alone the constitutional part of the statute, the entire statute should fall.[24]

The Government would have the Court return the Kidnaping Act to substantially its original form, providing a maximum penalty of life or an unlimited term of years for all persons transporting kidnaped persons across state lines. Yet the fact that Congress promptly amended the statute, changing it drastically, sharply undercuts the assumption that in 1934, when it amended the Act, Congress intended that if the amendment were held invalid the original Act should stand, or that Congress would now entertain such an intent. The 1934 Amendment did not merely increase the penalties for kidnaping; it changed the whole thrust of the Act. There is substantial evidence that the provision of the death penalty for defendants whose victims were not "liberated unharmed" was designed to encourage kidnapers to refrain from killing their victims to avoid detection and conviction.[25] Without this provision,

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[24] In both the cases cited by the Government, *Champlin Rfg. Co.* v. *Commission*, 286 U.S. 210, 234; and *United States* v. *Harriss*, 347 U.S. 612, 627, the statutes in question contained express severability clauses. Where, as here, there is no severability clause, the presumption is against severance. *Electric Bond Co.* v. *Comm.*, 303 U.S. 419, 434, and cases cited.

[25] See *Robinson* v. *United States*, 324 U.S. 282, 284; Bowmar, *The Lindbergh Law*, 1 Law and Cont. Prob. 435, 440 (1934);

which alone distinguishes the penalties applicable to those who do and those who do not harm or kill their victims, a kidnaper will be more strongly tempted to compound his crime by murder than if some distinction were made. Given the evidence of Congressional concern with this problem, and that it was resolved in favor of drawing the distinction, it is doubtful that Congress would intend for the statute to stand absent such a feature. This is even clearer now when all the States have anti-kidnaping laws and when there are several other provisions of the U.S. Code which justify federal investigative jurisdiction in kidnaping cases.[26] Complete invalidation of the law is quite unlikely to permit a kidnaper to escape detection and punishment, but likely to avoid giving him an incentive to murder his victim.

Given these considerations, plus the settled presumption against severability when there is no severability clause,[27] the court below was correct in holding the whole statute invalid. There are, moreover, other practical considerations pointing in the same direction. The only way in which a defendant facing the constitutionally impermissible choice thrust upon him by a statute such as §1201 can fully protect himself is to challenge the validity of the statute *before trial* by moving to dismiss the indictment. Yet unless the

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Keenan, *New Weapons for the War on Kidnapers*, N.Y. Times, May 20, 1934.

[26] See, *e.g.*, 18 U.S.C. §241 (conspiracy to injure or intimidate person in exercise of any right or privilege secured to him by the Constitution or laws of the United States), §875 (transmission or communication of a ransom demand or threat to kidnap), §1073 (flight to avoid prosecution), §1202 (receipt or possession of ransom money or other property), §2312 (transportation of stolen vehicle), §2314 (transportation of stolen goods).

[27] *Electric Bond Co.* v. *Comm.*, *supra*, note 24.

statute is held invalid or nugatory, there is no ground for dismissing the indictment. Thus, if the lower court is reversed for dismissing count one of the indictment, even though the penalty provision is unconstitutional, defendants in the future will have no feasible way to challenge such provisions at a time—before entry of a final plea—when prejudice to their cause may be averted. Total invalidity, therefore, is part and parcel of an essential remedy for unconstitutional penalties of the type contained in §1201.

Even if the Court disagrees with the above argument, the lower court's decision should be affirmed, for the Government's assumption that the death penalty provision is the only constitutionally offensive part of the statute is in error. The only inoffensive segment of the statute is that portion which proscribes the transportation of kidnaped persons across state lines. Yet this proscription, standing by itself, cannot support count one of the indictment because it contains no penalty and is therefore nugatory.

The death penalty provision of §1201 in and by itself does not impair the exercise of defendant's Fifth and Sixth Amendment rights. Were death the only penalty provided in the statute, its presence would not encourage defendants to plead guilty or threaten them if they demanded trial by jury. The death penalty provision and the clause which provides for imprisonment for a term or life together constitute the unlawful inducement. Together, one is a carrot and the other a stick. Separately, neither is either. The penalty provision as an integrated whole provides the inducement to forego constitutional rights. The entire penalty provision is therefore constitutionally offensive and should be stricken.[28] Since this leaves only the bare pro-

[28] *Cf. Weems* v. *United States*, 217 U.S. 349, 381.

scription which might be considered severable, and since there is apparently no omnibus provision in the U.S. Code prescribing penalties for crimes for which the penalties are not specified, the first count of the indictment was properly dismissed and the decision should be affirmed even if the inoffensive provision is considered severable.[29]

Conclusion

The judgment of the district court should be affirmed.

Respectfully submitted,

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October, 1967

[29] We assume that whether the Court holds the entire statute or merely the penalty provision invalid, since the infringement is against procedural rights, the Court is free to limit the retroactive effect of the judgment. *Linkletter* v. *Walker*, 381 U.S. 618; *Tehan* v. *United States ex rel. Shott*, 382 U.S. 406; *Johnson* v. *New Jersey*, 384 U.S. 719.